Fam Meng Siong & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05–107 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
27 MARCH 2012

B

Criminal Law — Penal Code — s 149 — Common object — Whether prosecution established that appellants had common object in commission of murder — Whether evidence supported findings of fact — Penal Code ss 34, 149 & 302

C

Criminal Procedure — Charge — Alternative charges — Conviction on alternative charge — Whether tendering of alternative charge in midst of trial made it invalid — Whether appellants prejudiced by mode of tendering alternative charge — Whether there was serious miscarriage of justice — Penal Code ss 34, 149 & 302 — Criminal Procedure Code ss 158, 166 & 177A

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The appellants together with two others ('the two co-accused') were originally charged and tried for the murder of one Te Lui Yet ('the deceased'), an offence under s 302 of the Penal Code ('Code') read with s 34 of the same Code ('the main charge'). The doctor who conducted the post mortem on the deceased ('the doctor') confirmed that the cause of death was due to multiple stab wounds. The doctor further testified that the laceration wounds on the head of the deceased and the deceased's fractured skull could have been inflicted by a blunt object, such as a baseball bat. Eye witness accounts showed that the first appellant had used a baseball to hit the deceased's head and that the second appellant had hit the deceased with his hands. In the midst of trial in the High Court, ie after the fifth prosecution's witness had testified, the prosecution tendered an alternative charge under s 149 of the Penal Code and punishable under s 302 of the Code ('the alternative charge') against the appellants and the two co-accused. This alternative charge under s 149 of the Code provided that where an offence was committed by any member of an unlawful assembly then every person who was a member of that assembly was guilty of an offence. When the alternative charge was tendered, the two appellants were asked to plead. After they claimed trial to the alternative charge, the trial judge continued with the trial. At the close of the prosecution's case, the trial judge acquitted both the appellants on the main charge but called upon them to enter their defence on the alternative charge. In making their defence, both appellants gave sworn evidence. At the end of the trial, the trial judge held that the appellants had failed to raise any reasonable doubt on the prosecution's case and accordingly found them guilty on the alternative charge and sentenced them to death. This was the appellants' appeal against their conviction and

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sentence. The main thrust of the appellants' argument before this court was that the introduction of the alternative charge in the midst of the trial had placed them in a tactical disadvantage and deprived them of the benefit of recalling the witnesses. The appellants submitted that there was no written consent from the deputy public prosecutor ('DPP') under s 177A of the Criminal Procedure Code ('CPC') for the prosecution of the appellants on the alternative charge. As such it was the appellants contention that the trial was a nullity and that it followed that their conviction and sentence was also bad in law. The appellants also submitted that since there was a delay of more than six years, there ought not to be a retrial. The prosecution submitted that the tendering of the alternative charge was made pursuant to s 166 of the CPC and that it had the power to do so without having to make an application under s 158 of the CPC.

Held, dismissing the appeal:

(1) (per **Abu Samah JCA**) It was the view of this court that the trial of the appellants on the alternative charge was not a nullity notwithstanding the absence of a written consent from the DPP, since the prosecution at the High Court was conducted by the DPP himself. Under the circumstances, consent to the prosecution of the appellants on the alternative charge could be implied. Further the appellants had not raised any objection to the alternative charge nor applied to recall any prosecution's witnesses pursuant to the introduction of the alternative charge (see paras 17–18).

(2) (per **Abu Samah JCA**) The discretionary power of the PP to prefer an alternative charge before the close of the prosecution's case was not a transgression of the power of the court to alter or add a charge at any time before judgment under s 158 of the CPC. Thus, the appellants were not prejudiced by the introduction of the alternative charge and there were no grounds to conclude that there was a miscarriage of justice (see paras 19–21).

(3) (per **Abu Samah JCA**) The words 'common object' in s 149 of the Code did not necessarily bear the same meaning as the words 'common intention' in s 34 of the Penal Code, in that, the former did not require a pre-arranged plan and an unlawful object could develop after the people got together. This court was of the view that based on the eye witness accounts and the testimony of the doctor who conducted the post-mortem on the deceased there was sufficient evidence before the trial judge which pointed to the 'common object' of the appellants. The evidence thus supported the findings of fact that the appellants had participated in the unlawful assembly with the common object of causing

the death of the deceased and that being members of the unlawful assembly they knew that the said offence would be likely to be committed (see paras 22–24, 27–34).

(4) (per **Mohd Hishamudin JCA, dissenting**) Section 166 of the CPC that was being relied upon by the DPP to justify the tendering of the alternative charge at that stage of the proceedings did not confer any power on the prosecution to tender an alternative charge after the trial had progressed. Once a trial had started, the prosecution could no longer tender the additional charge as of right and it could only tender an additional charge after it had applied to do so under s 158 of the CPC. As such, the prosecution could not tender an alternative charge in the midst of the trial merely as an afterthought, or merely because the prosecution had not carefully studied its case before preferring the original charge. In the present case, as the prosecution had erroneously assumed that it was not bound by s 158 of the CPC and that it had the power to tender an alternative charge under s 166 of the CPC in the midst of the trial, when in law it did not have such a power to by-pass s 158 of the CPC, the alternative charge was invalid and a nullity. Further, since the charge was invalid, the fact that the appellants did not object to the alternative charge did not make the invalid charge a valid charge. As such, since the trial had not been conducted in accordance with the law, namely the CPC, the conviction and sentence of the appellants was unconstitutional, null and void (see paras 59, 61, 66, 70–71).

[Bahasa Malaysia summary

Perayu-perayu bersama dua yang lain ('dua tertuduh bersama') telah pada asalnya dituduh dan didengar kerana membunuh Te Lui Yet ('si mati'), kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun yang sama ('tuduhan utama'). Doktor yang telah menjalankan bedah siasat terhadap si mati ('doktor tersebut') mengesahkan bahawa punca kematian adalah disebabkan oleh luka tikaman berbilang. Doktor selanjutnya memberi testimoni bahawa luka melecet pada kepala si mati dan fraktur pada tengkorak si mati boleh disebabkan oleh objek tumpul, seperti kayu besbol. Keterangan saksi yang melihat sendiri menunjukkan bahawa perayu pertama telah menggunakan kayu besbol untuk memukul kepala si mati dan bahawa perayu kedua telah memukul si mati dengan tangannya. Di pertengahan perbicaraan di Mahkamah Tinggi, iaitu selepas saksi kelima pendakwaan telah memberikan testimoni, pendakwaan telah menender tuduhan alternatif di bawah s 149 Kanun Keseksaan dan boleh dihukum di bawah s 302 Kanun ('tuduhan alternatif') terhadap perayu-perayu dan kedua-dua tertuduh bersama. Tuduhan alternatif di bawah s 149 Kanun memperuntukkan bahawa di mana suatu kesalahan telah dilakukan oleh mana-mana ahli perhimpunan tidak sah oleh itu setiap ahli perhimpunan tersebut adalah bersalah bagi kesalahan tersebut. Semasa tuduhan alternatif telah ditender, kedua-dua

perayu telah diminta untuk membuat akuan. Selepas mereka menuntut perbicaraan untuk tuduhan alternatif, hakim perbicaraan telah meneruskan perbicaraan. Pada penutup kes pendakwaan, hakim perbicaraan telah membebaskan kedua-dua perayu atas tuduhan utama tetapi telah meminta mereka memasukkan pembelaan atas tuduhan alternatif. Dalam membuat pembelaan mereka, kedua-dua perayu telah memberikan keterangan bersumpah. Pada akhir perbicaraan, hakim perbicaraan telah memutuskan bahawa perayu-perayu telah gagal untuk menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan dan selanjutnya mendapati mereka bersalah atas tuduhan alternatif dan menjatuhkan hukuman mati terhadap mereka. Ini merupakan rayuan perayu-perayu terhadap sabitan dan hukuman mereka. Poin utama hujahan perayu-perayu di hadapan mahkamah ini adalah bahawa pengenalan tuduhan alternatif semasa perbicaraan telah menempatkan mereka dalam keadaan taktikal yang melemahkan dan menafikan mereka faedah untuk memanggil semula saksi-saksi. Perayu-perayu berhujah bahawa tidak terdapat kebenaran bertulis daripada timbalan pendakwa raya ('TPR') di bawah s 177A Kanun Acara Jenayah ('KAJ') untuk pendakwaan terhadap perayu-perayu atas tuduhan alternatif. Oleh itu, adalah menjadi hujahan perayu-perayu bahawa perbicaraan tersebut adalah tidak sah dan bahawa ia menjadikan sabitan dan hukuman mereka salah di sisi undang-undang. Perayu-perayu juga telah berhujah bahawa memandangkan terdapat kelewatan lebih dari enam tahun, perbicaraan semula tidak seharusnya dilakukan. Pendakwaan telah berhujah bahawa penenderan tuduhan alternatif telah dilakukan menurut s 166 KAJ dan bahawa ia mempunyai kuasa untuk melakukannya tanpa membuat permohonan di bawah s 158 KAJ.

Diputuskan, menolak rayuan:

(1) (oleh **Abu Samah HMR**) Adalah menjadi dapatan mahkamah ini bahawa perbicaraan tuduhan alternatif perayu-perayu adalah tidak terbatal meskipun dalam ketiadaan kebenaran bertulis daripada TPR, memandangkan pendakwaan di Mahkamah Tinggi telah dilakukan oleh TPR sendiri. Dalam keadaan sedemikian, kebenaran untuk mendakwa perayu-perayu terhadap tuduhan alternatif boleh dianggap sebagai tersirat. Selanjutnya, perayu-perayu tidak membangkitkan sebarang bantahan terhadap tuduhan alternatif mahupun memohon untuk memanggil mana-mana saksi pendakwaan berikutan pengenalan tuduhan alternatif tersebut (lihat perenggan 17–18).

(2) (oleh **Abu Samah HMR**) Kuasa budi bicara PR untuk memilih tuduhan alternatif sebelum penutup kes pendakwaan bukanlah pelanggaran kuasa mahkamah untuk mengubah atau menambahkan tuduhan pada bila-bila masa sebelum penghakiman di bawah s 158 KAJ. Justeru, perayu-perayu adalah tidak diprejudis oleh pengenalan tuduhan alternatif dan tidak terdapat sebarang alasan untuk menunjukkan bahawa terdapat ketidakadilan (lihat perenggan 19–21).

(3) (oleh **Abu Samah HMR**) Perkataan 'common object' dalam s 149 Kanun tidak semestinya membawa maksud yang sama seperti perkataan 'common intention' dalam s 34 Kanun Keseksaan, yakni, perkataan sebelumnya tidak memerlukan pelan yang dirancang terlebih dahulu dan objek tidak sah boleh terjadi selepas kesemua orang telah berkumpul bersama. Mahkamah ini adalah berpendapat bahawa berdasarkan keterangan saksi dan testimoni doktor yang telah menjalankan bedah siasat ke atas si mati, terdapat bukti yang mencukupi di hadapan hakim perbicaraan yang menunjukkan kepada 'common object' perayu-perayu. Keterangan justeru menyokong dapatan fakta bahawa perayu-perayu telah mengambil bahagian dalam perhimpunan tidak sah dengan tujuan bersama untuk menyebabkan kematian si mati dan bahawa dengan menjadi ahli-ahli perhimpunan tidak sah tersebut mereka mengetahui bahawa kesalahan tersebut berkemungkinan akan dilakukan (lihat perenggan 22–24, 27–34).

(4) (oleh **Mohd Hishamudin HMR, menentang**) Seksyen 166 KAJ yang telah disandarkan oleh TPR untuk menjustifikasikan penenderan tuduhan alternatif pada peringkat prosiding tersebut tidak memberikan sebarang kuasa ke atas pendakwaan untuk menender tuduhan alternatif selepas perbicaraan telah dijalankan. Sejurus perbicaraan telah dimulakan, pendakwaan tidak boleh lagi menender tuduhan tambahan sebagai hak dan hanya boleh menender tuduhan tambahan selepas ia memohon untuk melakukan sedemikain di bawah s 158 KAJ. Oleh demikian, pendakwaan tidak boleh menender tuduhan alternatif di pertengahan perbicaraan setelah berfikir semula, atau hanya kerana pendakwaan tidak menyelidik kesnya dengan berhati-hati sebelum memilih tuduhan asal. Dalam kes ini, memandangkan pendakwaan telah dengan silap menganggap bahawa ia tidak terikat oleh s 158 KAJ dan bahawa ia mempunyai kuasa untuk menender tuduhan alternatif di bawah s 166 KAJ di pertengahan perbicaraan adalah tidak sah dan terbatal. Selanjutnya, memandangkan tuduhan adalah tidak sah, fakta bahawa perayu-perayu tidak membantah terhadap tuduhan alternatif tidak menjadikan tuduhan tidak sah tersebut sebagai sah. Oleh itu, memandangkan perbicaraan tidak dilakukan mengikut undang-undang, iaitu KAJ, sabitan dan hukuman perayu-perayu adalah tidak berpelembagaan, terbatal dan tidak sah (lihat perenggan 59, 61, 66, 70–71)].]

Notes

For a case on s 149, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1588.
For cases on validity on alternative charges, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1134–1147.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)
Barendra Kumar Ghosh v Emperor AIR 1925 PC 1, PC (refd)

Bunnilal Chandhary v State of Bihar [2006] Cri LJ 3297, SC (refd)
Chandran & Ors v PP [1992] 2 SLR 265, CA (refd)
Garmaz s/o Pakhar & Anor v PP [1995] 3 SLR 701, HC (refd)
Gillard v R [2003] HCA 64, HC (refd)
Harun bin Abdullah v PP [1998] 3 MLJ 1, CA (refd)
Lalji & Ors v State of UP AIR 1989 SC 754, SC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mohd Haikal bin Mohd Khatib Saddaly & Ors v PP [2009] 4 MLJ 305; [2011] 5 CLJ 369, CA (refd)
PP v Oie Hee Koi & Associated appeals [1968] 1 MLJ 148; [1967] 1 LNS 132, PC (refd)
PP v Thurairaj a/l Arulnathan [2009] 9 MLJ 40, HC (refd)
R v Jones (1974) 59 Cri App Rep 120, CA (refd)
R v Turnbull [1977] QB 224, CA (refd)
Ram Dular Rai v State of Bihar [2004] Cri LJ 635, SC (refd)
Sita Ram v State of MP [1991] 3 Crimes 523, HC (refd)
Sukha & Ors v State of Rajasthan AIR 1956 SC 513, SC (refd)
Tarmizi bin Yacob & Anors v PP and another appeal [2011] 4 MLJ 1; [2010] 8 CLJ 501, FC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Code of Criminal Procedure [IND] s 216(1)
Criminal Procedure Code ss 158, 158(1), 159, 160, 166, 177A, 376, 422
Federal Constitution arts 5, 145, 145(3)
Penal Code ss 34, 149, 302, 304

Appeal from: Criminal Trial No 45–04 of 2006 (High Court, Melaka)

Karpal Singh (Sanjeet Kaur Deo with him) for the first appellant.
Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him) for the second appellant.
Mohamad Abazafree bin Mohamad Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abu Samah JCA (delivering majority judgment of the court):

[1] This is the majority judgment of the court. My learned sister, Justice Aziah Ali had seen this judgment in draft and expressed her agreement with it.

[2] We have before us an appeal by the appellants against their convictions

on an alternative charge under s 149 of the Penal Code ('the Code') and punishable under s 302 of the said Code.

[3] Originally the first and second appellants (the first and third accused in the High Court below) were charged and tried for an offence of murder under s 302 of the Code read with s 304 of the Code together with the second and fourth accused for causing the death of one Te Lui Yet ('deceased').

[4] In the midst of the trial at the High Court, that is, after the fifth prosecution's witness had given evidence, the learned deputy public prosecutor ('DPP') tendered an alternative charge under s 149 of the Code and punishable under s 302 of the Code against all the four accused together with 14 others who were at large. Section 149 of the Code provides that where an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of an offence. The alternative charge was read, explained and understood by all the accused. They also claimed trial to the alternative charge.

[5] From that point onwards all the four accused were tried under both charges. The prosecution called 22 witnesses.

[6] At the end of the prosecution's case, the learned trial judge found that the prosecution had failed to prove a prime facie case against all the four accused on the original charge of murder under s 302 of the Code. Accordingly the learned judge acquitted and discharged them on the said charge.

[7] The learned judge however found that the prosecution had established a prime facie case against the appellants on the alternative charge and called upon them to enter their defence. Both appellants gave evidence on oath. At the end of the trial, the learned judge held that the appellants had failed to raise any reasonable doubt on the prosecution's case and accordingly found them guilty on the alternative charge and sentenced them to death.

[8] Before us, the respective learned counsel for the appellants raised several grounds of appeal, some of which are grounds common to both appellants. With respect to the common grounds learned counsel for the second appellant, adopted, wherever applicable, the submission of learned counsel for the first appellant.

APPEAL BY THE FIRST APPELLANT

[9] The main ground of appeal by the first appellant is that the learned judge

was wrong in allowing the prosecution to introduce an alternative charge under s 149 of the Code and punishable under s 302 of the said Code in the midst of the trial as the case was only transmitted to the High Court pursuant to the written consent of the deputy public prosecutor under s 177A of the Criminal Procedure Code ('CPC') for trial under s 302 of the Penal Code. There was no written consent by the deputy public prosecutor under s 177A of the CPC for prosecution of the four accused on the alternative charge. It was submitted that the introduction of the alternative charge in the midst of the trial had placed the appellants in a tactical disadvantage and deprived them of the benefit of recalling the witnesses. Under the circumstances learned counsel for the first appellant contended that the trial was a nullity entitling the appellants to be acquitted and discharged. (*Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50). It was contended that since there was a delay of more than six years, there ought not to be a retrial.

[10] The next ground raised by the first appellant is that the learned judge erred in calling upon the appellants to enter their defence on the alternative charge after having acquitted them on the original charge under s 302 of the Penal Code. The learned judge had also misdirected himself on the law on prime facie without subjecting the prosecution's evidence to a maximum evaluation (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805).

[11] The other grounds raised by the first appellant include, among others, the failure of the learned judge in not holding the evidence of identification as defective for failing to conform to the *Turnbull* guidelines (*R v Turnbull* [1977] QB 224). The judgment of the learned judge, it was submitted, was sketchy and not a speaking judgment. The learned judge also erred in not directing his mind to the defence of sudden fight.

APPEAL BY THE SECOND APPELLANT

[12] Next, I come to the grounds of appeal by the second appellant. Learned counsel for the second appellant also raised several grounds of appeal. The main thrust of the second appellant's contention is that the prosecution had not made out a case for an offence under s 149 of the Code which is punishable under s 302 of the said Code. The only evidence against the second appellant was based on the evidence of PW8, who was not a credible witness and whose evidence was without any corroboration. PW8 testified that he only saw the second appellant hitting the deceased with his hands.

[13] There were also major inconsistencies in the prosecution's evidence and that the learned judge had contradicted himself in his evaluation of the

evidence of witnesses before him, including the perfunctory manner the learned judge dealt with the evidence relating to identification of the appellants.

[14] Before us, learned counsel for the second appellant submitted at length on the ingredients to be proved for an offence under s 149 of the Penal Code and punishable under s 302 of said Code. It was contended that the prosecution had failed to prove that the appellants had a 'common object' in the commission of the offence in the alternative charge. Several cases were cited to us by learned counsel for the second appellant. See *Ram Dular Rai v State of Bihar* [2004] Cri LJ 635; *Sita Ram v State of MP* [1991] 3 Crimes 523 (MP); *R v Jones* (1974) 59 Cri App R 120, *Public Prosecutor v Thurairaj a/l Arulnathan* [2009] 9 MLJ 40, *Bunnilal Chandhary v State of Bihar* [2006] Cri LJ 3297, *Gillard v R* [2003] HCA 64. Learned counsel for the second appellant submitted that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and that he was actuated by that common object.

[15] In response to the second appellant's submission on s 149 of the Code learned DPP for the respondent cited to us, among others,*Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor* [2009] 4 MLJ 305; [2011] 5 CLJ 369; *Lalji & Others v State of UP* AIR 1989 SC 754; *Sukha & Ors v State of Rajasthan* AIR 1956 SC 513, at p 518; *Chandran & Ors v Public Prosecutor* [1992] 2 SLR 265 at p 269 *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1.

[16] We have read and considered the authorities and the submission by the respective parties. Our views on the specific issues raised by the appellants are as follows.

CONSENT OF PROSECUTION TO THE ALTERNATIVE CHARGE

[17] The first issue is on consent of the prosecution to the alternative charge. In our considered view, the trial of the appellants on the alternative charge was not a nullity notwithstanding the absence of a written consent from the DPP. We note that the prosecution at the High Court was conducted by the DPP himself. Under the circumstances consent to the prosecution of all the accused on the alternative charge could be implied: *Tarmizi Yacob & Anor v Public Prosecutor and another appeal* [2011] 4 MLJ 1; [2010] 8 CLJ 501, *Garmaz s/o Pakhar & Anor v Public Prosecutor* [1995] 3 SLR 701, *Public Prosecutor v Oie Hee Koi* [1968] 1 MLJ 148; [1967] 1 LNS 132 (PC).

[18] The notes of proceedings at the High Court showed that the alternative charge was read to all the accused, including the appellants and that they claimed trial to the alternative charge. The appellants were represented by

counsel, who did not raise any objection to the alternative charge nor applied to recall any prosecution's witnesses pursuant to the introduction of the alternative charge. The court, which had control of the whole proceedings, did not object to the tendering of the alternative charge.

[19] It is within the discretion of the public prosecutor to decide what charges should be preferred in the course of the trial. In *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 at pp 156–158, Suffian LP, after citing s 376 of the CPC said:

> … from this it would appear that the public prosecutor has a discretion as to what charges should be preferred, subject of course to the power of the court to amend charges in the course of trial. That the law intends to give a wide discretion over criminal prosecutions to the public prosecutor appears from other provisions of the Criminal Procedure Code providing that for the prosecution of certain offence his complaint is required (s 130) and yet for other offences his written sanction (s 120).

[20] In respect of art 145(3) of the Constitution, Suffian LP said:

> In our view this clause from the supreme law clearly gives to attorney general very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he instituted, and the courts cannot compel him to institute any criminal proceedings he does not wish to institute or to go on with any criminal proceedings which he decided to discontinue.

[21] The discretionary power of the public prosecutor to prefer an alternative charge before the close of the prosecution's case is not a transgression of the power of the court to alter or add a charge at any time before judgment under s 158 of the CPC. In our view the appellants were not in any way prejudiced by the introduction of the alternative charge to which they claimed trial. There is no ground before us to conclude that there was a miscarriage of justice.

COMMON OBJECT

[22] The next issue is whether the prosecution had established that the appellants had a common object in the commission of the offence in the alternative charge. The words 'common object' in s 149 of the Penal Code do not necessarily bear the same meaning as the words 'common intention' in the s 34 of the Penal Code. In *Sukha & Ors v State of Rajasthan* AIR 1956 SC 513, the Supreme Court of India held that:

a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get together.

[23] Section 149 of the Code does not require proof of a prearranged plan and a common intention which a prosecution involving s 34 of the Code would require (*Chandran & Ors v Public Prosecutor* [1992] 2 SLR 265).

[24] Section 149 speaks of 'common object' of the assembly as opposed to 'common intention' of several persons in s 34 of the Penal Code.

[25] In *Lalji & Ors v State of UP* AIR 1989 SC 754, the Supreme Court of India held that:

> Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. The section creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the act done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with him own hands would be immaterial.

[26] Gour's 'Penal Law of India' (7th Ed) at p 710 states:

> The purpose for which the members of the assembly set out or which they desired to achieve is the object. Each member may have an object in view and may also have his own idea of the means with which that object is to be achieved and the extent to which he is prepared to go for attaining it. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved; the object then becomes the common object of the assembly. Normally, a determination to achieve an object includes a resolve to meet with force any resistance to its attainment. A common object may be found by express agreement after mutual consultations but that is not necessary. It may be formed at any stage by all or some members of the assembly and the other members may join and accept it. It may be modified or altered or abandoned at any stage. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined by keeping in view the nature of the assembly, the arms it carries and the behaviour of its members at or near the scene of the incident.

[27] In our judgment, there was sufficient evidence before the learned judge which point to the 'common object' of the appellants based on the evidence of PW7, PW8 and PW21.

[28] PW7 saw the first appellant used the baseball bat to hit the deceased's head. PW8 saw the second appellant hit the deceased with his hands. It is immaterial what role he played in the prosecution of the common object. As the Supreme Court in *Lalji & Ors v State of UP* said, 'once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial'. The second appellant was not a mere bystander.

[29] The doctor ('PW10') who conducted the post-mortem on the deceased gave evidence that there were laceration wounds on the head of the deceased and that the deceased's fractured skull was caused by a blunt object. When shown the baseball bat, he said that it could be the blunt object.

[30] According to PW10, the cause of death was due to multiple stab wounds. There was evidence from PW7 and PW21 that sharp objects such as knife and 'parang panjang' were used by the other members of the unlawful assembly in the prosecution of the common object resulting in the multiple injuries suffered by the deceased. PW8 himself was also stabbed with a knife.

[31] There was also evidence from PW7 and PW8 that a car bearing Registration No MBD9199 ('Avanza') was used to run over the deceased when he fell down. PW16, the police forensic expert, testified that the deceased's blood stains were found on the front bumper and the under carriage of the said car. PW7 at p 74 of the appeal record said:

> 'Saya mengelak kereta itu terus langgar OR LANG … Kereta itu terus lari dari situ. Saya lihat OR LANG terbaring di atas jalan'. OR LANG was the nickname of the deceased.

PW8 at p 6 of the appeal record said:

> selepas mereka pukul kami mereka naik kereta Avanza itu semula dan menggelek Or Lang ('deceased') yang ada di situ.

[32] SP21 at p 203 of the appeal record said:

> saya cuba tarik OR LANG (deceased) tetapi tak sempat kerana kepala OR LANG sudah berada di bawah kereta.

The driver of the car then got out of his car. This is what SP21 said:

> saya nampak orang itu menggunakan kayu, parang, pisau dan kayu baseball.

[33] The identity of the appellants is not based solely on the evidence of PW7, PW8 and PW21 in the identification parade: *Ahmad Najib bin Aris v*

Public Prosecutor [2009] 2 MLJ 613. It is also in evidence that PW8 knew the appellants more than one year prior to the incident. PW9 also knew the first appellant as he was her boyfriend's friend.

[34] We find that there was sufficient evidence to support the learned judge's findings of fact that the appellants had participated in the unlawful assembly with the common object of causing the death of the deceased and that being members of the unlawful assembly, they knew that the said offence would be likely to be committed in the prosecution of that common object.

[35] For the above reasons, we dismiss the appeal by the appellants and affirm the conviction and sentence of the learned judge.

Mohd Hishamudin JCA (dissenting):

[36] This is an appeal by the appellants, namely, Fam Meng Siong and Tan Jui Bin, against the decision of the High Court of Malacca. On 8 July 2008 the High Court had found them guilty of the charge of being members of an illegal assembly with the common object of committing the murder of one Te Lui Yet; an offence under s 149 of the Penal Code read with s 302 of the same. They were sentenced to death.

[37] Having heard submissions on 3 and 27 January 2012, we had reserved judgment.

[38] Today, we deliver our judgment.

[39] On my part, I am allowing the appeal.

[40] My reasons are as follows.

[41] In the instant case, originally, the appellants were charged with two other co-accused under s 302 of the Penal Code read with s 34 of the same. The charge reads:

> Pertuduhan:
>
> Bahawa kamu bersama-sama yang lain, pada 29/04/2005 jam antara 2.00 pagi hingga 2.15 pagi, di belakang Pasaraya Sen yum Super Plaza Melaka Raya, Taman Melaka, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, dengan niat bersama, telah melakukan pembunuhan sehingga menyebabkan kematian ke atas Te Lui Yet, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun yang sama.

[42] Subsequently, during the trial, after the prosecution had called five witnesses, the prosecution tendered an alternative charge under s 302 but this time read with s 149 of the Penal Code. This alternative charge reads:

> Pertuduhan Pilihan:
>
> Bahawa kamu bersama-sama 14 yang lain pada 29 April 2005 di antara jam lebih kurang 2.00 pagi dan 2.15 pagi bertempat di belakang Pasaraya Senyum Super Plaza Melaka di dalam Daerah Melaka Tengah di dalam Negeri Melaka adalah Ahli Perhimpunan yang menyalahi undang-undang di mana tujuan bersama kamu adalah untuk mengakibatkan kematian Te Lui Yet (No. Kad Pengenalan: 851215-04-5333) dan semasa kamu berada di dalam perhimpunan tersebut semua ahli perhimpunan tersebut seorang atau lebih daripada seorang daripada kamu dalam melaksanakan tujuan bersama kamu telah melakukan bunuh dengan menyebabkan kematian Te Lui Yet (No. Kad Pengenalan: 851215-04-5333), iaitu satu kesalahan di mana ahli-ahli perhimpunan mengetahui mungkin dilakukan dalam melaksanakan tujuan bersama perhimpunan tersebut dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 149 Kanun Keseksaan dan boleh dihukum di bawah seksyen 302 Kanun tersebut.

[43] From the grounds of judgment of the learned trial judge, one gets the impression that the alternative charge was tendered together with the principal charge at the commencement of the trial.

[44] However, this was not the case. As I have said earlier, this alternative charge was tendered by the prosecution only after five prosecution's witnesses had testified.

[45] From the notes of evidence, it appears that the above alternative charge was tendered by the deputy public prosecutor at the trial without making an application to the court pursuant to s 158 of the Criminal Procedure Code ('the CPC'). This section provides:

> Court may alter or add to charge
>
> 158
>
> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[46] The notes of evidence read:

> Kemukakan pertuduhan pilihan
>
> Eksibit P58.

Mahkamah:

Pertuduhan dibaca dan faham — Eksibit P58

Orang Kena Tuduh 1: Mohon bicara

Orang Kena Tuduh 2: Mohon bicara

Orang Kena Tuduh 3: Mohon bicara

Orang Kena Tuduh 4: Mohon bicara

[47] Encik Abazafree Abas, the learned DPP, on being asked by me, confirmed that this tendering of the alternative charge was not made pursuant to an application to the trial court under s 158 of the Criminal Procedure Code ('the CPC'), but was made pursuant to s 166 of the CPC. He takes the position that the prosecution has the power to do so without having to make an application under s 158.

[48] Section 166 of the CPC reads:

> 166 Where it is doubtful what offence has been committed
>
> If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences; and any number of the charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

[49] The notes of evidence also show the unfortunate fact that the learned trial judge, with respect, had allowed the learned deputy public prosecutor to do what he did without any question asked. The learned trial judge merely marked the alternative charge as an exhibit (exh P58). The fact that the learned deputy public prosecutor did not bother to apply to the court to tender an alternative charge pursuant to s 158 of the CPC did not (again with respect) appear to trouble the learned trial judge at all.

[50] It is significant to note that after the tendering of the alternative charge, the main charge was not abandoned but was still proceeded with until the close of the prosecution's case.

[51] When the alternative charge was tendered, the two appellants (and the other two co-accused) were asked to plead; and after they (and the two other co-accused) claimed trial to the alternative charge, the learned trial judge continued with the trial. It is important to note that the two appellants (as well as the other two co-accused) were never asked as to whether they agreed or objected to the alternative charge; nor were they asked as to whether they were ready to proceed immediately on the alternative charge.

[52] At the close of the prosecution's case, after hearing submissions of no case to answer, the learned trial judge acquitted both the appellants (as well as the other two co-accused) on the main charge (s 302 of the Penal Code read with s 34 of the same) but called upon both the appellants (only the two appellants) to enter their defence on the alternative charge (s 302 read with s 149 of the Penal Code).

[53] In making their defence, both appellants gave sworn evidence. The learned trial judge at the conclusion of the trial found both appellants guilty of the alternative charge and imposed the mandatory death sentence.

[54] Both appellants appeal to this court against their conviction and sentence.

[55] The prosecution, however, is not appealing against the acquittal of the appellants (or the acquittal of the other two co-accused) on the principal charge at the close of the case for the prosecution.

[56] Before this court the appellants submits that the alternative charge is invalid and a nullity; and it follows that the conviction and sentence is bad in law.

[57] It is argued by the appellants that once a trial has commenced the prosecution can no longer tender an alternative charge as of right. It is argued by the appellants that once a trial has commenced the prosecution must follow the procedure as prescribed by ss 158 and 159 of the CPC in order to tender an alternative charge.

[58] This means that the prosecution must apply to the trial court pursuant to s 158 of the CPC that they be allowed to tender an alternative charge; and the trial court must exercise its discretion as to whether to allow or not the tendering of the alternative charge. And if the trial court, having exercised its discretion, decides to allow the tendering of the alternative charge, then the trial court must make an order accordingly.

[59] In my judgment s 166 of the Criminal Procedure Code ('the CPC'), that is being relied upon by the learned DPP to justify the tendering of the alternative charge at that stage of the proceedings, does not confer any power on the prosecution to tender an alternative charge after the trial has progressed. An alternative charge, like the principal charge, in order for it to be tendered by the prosecution without the intervention of the trial court, must be tendered at the commencement of the trial. Section 166 only deals with prescribing the manner of framing a charge (or charges) where there is a doubt on the part of prosecution as to the actual nature of the offence (or offences) that is alleged to

have been committed. This provision has no relevance on the question as to whether or not the prosecution can tender an alternative charge once the trial has progressed.

[60] In my view, an alternative charge is an *additional* charge to the principal charge for the purpose of ss 158 and 159 of the CPC. According to *Sarkar Criminal Procedure Code*, Vol 1, (9th Ed), (Reprint 2010), on the meaning of the word 'add to' as found in sub-s (1) of s 216 of the Indian Code of Criminal Procedure (which is in pari materia with sub-s (1) of s 158 of the our CPC) (at p 989):

> The words 'add to' mean addition of new charge and not mere addition of a few words or corrections.

[61] In my judgment, once a trial has started, any addition to the principal charge can only be done with an order of the trial judge pursuant to s 158 of the CPC. This means that the prosecution can no longer tender the additional charge as of right. If the prosecution wishes to tender an additional charge (which includes an alternative charge), at any stage once the trial has progressed, it must make an application to do so under s 158 of the CPC, meaning that there must be an application to the trial court by the prosecution to tender the alternative charge, giving reasons for the necessity to do so; and the trial court must apply its mind to the application; must exercise its discretion, after having given the defence an opportunity of being heard on the application to tender the alternative charge. Having heard both sides, then the trial court must make an order allowing or disallowing the tendering of the proposed alternative charge.

[62] The reason as to why the prosecution must apply to the trial court, in order to tender an alternative charge, is not difficult to understand. Once a trial has commenced the trial judge is in control of the proceedings and not the prosecution. He is the adjudicator. The trial judge is there to ensure that that the trial is conducted in a fair manner; and not arbitrarily. It would be prejudicial to the defence if the prosecution is given a free hand to tender an alternative charge at any time it likes after the trial has commenced. Maintaining fairness in the proceedings requires that the tendering of the alternative charge has got to be made through the trial judge, and the prosecution must justify the tendering of the alternative at that stage of the proceeding. The tendering of the alternative charge at that stage must relate to the entire evidence so far adduced at the trial by the witnesses up to that stage. The prosecution cannot tender an alternative charge in the midst of the trial merely as an afterthought; or merely because the prosecution had not carefully studied its case before preferring the original charge. And as for the defence, it ought to be given an opportunity to be heard in relation to the proposed

alternative charge. The trial judge must exercise his *discretion* after having examined the view of both sides (the prosecution and the defence) and the entire scenario of the proceedings at that stage, always bearing in mind that he is there as an adjudicator to ensure that the proposed alternative charge does not prejudice the defence.

[63] Now if the trial court, having exercised its discretion under s 158, were to allow the tendering of the alternative charge, then the trial court must comply with the provision of s 159 of the CPC. This provision states:

> When trial may proceed immediately after alteration or addition.
>
> 159 If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge

[64] In view of the words '… the Court shall call upon the accused … to state whether he is ready to be tried …', one of the requirements of the section is that it is mandatory for the trial court to ask the accused as to whether he is ready to be tried on the added charge. Needless to say, this has not been done in the present case.

[65] In fact under s 160 of the CPC the trial judge even has the power to direct that the trial be conducted afresh or that the trial be adjourned to another date if he is of the view that to continue with the trial immediately after the tendering of the alternative charge would be prejudicial to the accused. This section reads:

> When new trial may be directed or trial suspended
>
> 160 If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[66] In the present case, as the prosecution had erroneously *assumed* that it is not bound by s 158 of the CPC, that it had the power to tender an alternative charge pursuant to s 166 of the CPC, after five prosecution's witnesses had been called, that is to say, in the midst of the trial, when in law it does not have such

a power to by-pass s 158, the alternative charge is, therefore, invalid and is a nullity. This tainted the legality of the whole trial. The whole trial had become a nullity.

[67] In my judgment, since the alternative charge is an invalid charge and therefore, a nullity, s 422 of the CPC could not be invoked to salvage the situation. This is not a case of a mere irregularity. The legal defect is fundamental. In *Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1 Malek Ahmad JCA (as he then was), in delivering the judgment of the Court of Appeal, said (at p 9):

> Of these three decisions, we must say that we are in full agreement with the decision in *Ishak Shaari v Public Prosecutor* where the learned trial judge held that s 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice.

[68] And I think I should also add that art 145 of the Federal Constitution does not give any power to the public prosecutor to disregard the provisions of the CPC. The CPC is enacted by Parliament to ensure that criminal proceedings are conducted in a fair manner.

[69] The provisions of the CPC (particularly, ss 158–160) govern the prosecution inasmuch as they govern the defence.

[70] Since the alternative charge is invalid and a nullity, the fact that the appellants were represented by counsel at the trial and that their counsel did not object to the tendering of the alternative charge is, to my mind, immaterial. The fact of not objecting does make an invalid charge a valid charge. The appellants ought not to be prejudiced or penalised, or to be allowed to suffer the consequences, by reason of the oversight or blunder on the part of their counsel during the trial.

[71] I propose to conclude by saying that art 5 of the Federal Constitution must always be upheld. No person shall be deprived of his life or personal liberty save in accordance with the law. In the present case, in my judgment, it is clear that the trial had not been conducted in accordance with the law, namely, the CPC. Hence the conviction and sentence of the appellants is unconstitutional, null and void.

[72] I am, therefore, allowing the appeal. The order of the High Court on conviction and sentence is hereby set aside.

[73] Both appellants are acquitted and discharged.

[74] Appeal allowed.

Appeal dismissed.

Reported by Kohila Nesan